

2000

A.K. & R. Whipple Plumbing and Heating v.
Thomas D. Guy, Diane M. Quinn and Aspen
Construction : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Steven B. Wall; Wall and Wall; Attorney for Appellee.

Joseph M. Chambers; Harris, Preston and Chambers; Attorneys for Appellants.

Recommended Citation

Brief of Appellee, *A.K. & R. Whipple Plumbing and Heating v. Thomas D. Guy, Diane M. Quinn and Aspen Construction*, No. 20001009 (Utah Court of Appeals, 2000).

https://digitalcommons.law.byu.edu/byu_ca2/3004

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

A.K. & R. WHIPPLE PLUMBING
AND HEATING,

Plaintiff/Appellee.

vs.

THOMAS D. GUY and ASPEN
CONSTRUCTION, a Utah corporation,

Defendants/Appellants.

:
:
: Priority No. 15
:
: No. 20001009-CA
:
:
:
: Trial Court Case:
: 940300014 CN
:
:

BRIEF OF APPELLEE

Appeal from an Order of the
Third Judicial District Court
Summit County, Utah
The Honorable Frank G. Noel, Presiding

Steven B. Wall
WALL & WALL
5200 South Highland Drive, Suite 300
Salt Lake City, Utah 84117

Attorney for Plaintiff/Appellee

Joseph M. Chambers (0612)
HARRIS, PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

Attorneys for Defendants/Appellants

FILED
Utah Court of Appeals

JUL 10 2001

Paulette Stagg
Clerk of the Court

TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW</u>	1
<u>APPLICABLE STATUTES AND RULE</u>	2
<u>STATEMENT OF THE CASE</u>	2
A. <u>NATURE OF THE CASE</u>	3
B. <u>COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW</u>	3
C. <u>STATEMENT OF FACTS</u>	4
<u>SUMMARY OF ARGUMENT</u>	8
<u>ARGUMENT</u>	9
I. <u>DEFENDANTS HAVE FAILED TO MARSHAL EVIDENCE ESTABLISHING AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT</u>	9
II <u>WHIPPLE IS THE SUCCESSFUL PARTY</u>	11
III <u>ATTORNEY’S FEES MUST BE REASONABLE</u>	13
<u>CONCLUSION</u>	16
<u>CERTIFICATE OF SERVICE</u>	18

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>A.K. & R. Whipple Plumbing & Heating vs. Aspen Construction,</u> 977 P.2d 518, 527 (Utah App. 1999).....	3, 4, 5
<u>Brown vs. Richards,</u> 840 P.2d 143 (Utah App. 1992).....	13
<u>Cabrera vs. Cottrell,</u> 694 P.2d 622 (Utah 1983).....	14
<u>Dixie State Bank vs. Bracken,</u> 764 P.2d 985 (Utah 1988).....	13
<u>Faust vs. Kai Technologies, Inc.,</u> 15 P.3d 1266 (Utah 2000).....	2
<u>Highland Constr. Co. vs. Stevenson,</u> 636 P.2d 1034, 1038 (Utah 1981).....	13
<u>Trayner vs. Cushing,</u> 688 P.2d 856 (Utah 1984).....	14
<u>Turtle Management, Inc. vs. Haggis Management, Inc.,</u> 645 P.2d 667, 671 (Utah 1982).....	14
<u>Valcarce vs. Fitzgerald,</u> 961 P.2d 305 (Utah 1998).....	10
<u>Wallace vs. Build, Inc.,</u> 16 Utah.2d 401, 402 P.2d 699 (1965).....	14

<u>Statutes and Constitutional Provisions:</u>	<u>Page</u>
Utah Code Annotated §38-1-18.....	2, 5, 16
Utah Code Annotated §38-11-107.....	2
Utah Code Annotated §58-55-604.....	5
Utah Code Annotated §78-2-2(4).....	1

IN THE UTAH COURT OF APPEALS

A.K. & R. WHIPPLE PLUMBING AND HEATING,	:	
	:	Priority No. 15
Plaintiff/Appellee.	:	
	:	No. 20001009-CA
vs.	:	
	:	
THOMAS D. GUY and ASPEN CONSTRUCTION, a Utah corporation,	:	
	:	Trial Court Case:
Defendants/Appellants.	:	940300014 CN

BRIEF OF APPELLEE

Appeal from an Order of the
Third Judicial District Court
Summit County, Utah
The Honorable Frank G. Noel, Presiding

JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Annotated §78-2-2(4), Utah Code Annotated, the Utah Supreme Court transferred this matter to the Utah Court of Appeals for disposition.

ISSUE PRESENTED FOR REVIEW

Was it patent error or did the trial Court abuse its discretion in refusing to grant either Whipple or Defendants their attorney fees related to the 77 Thaynes Canyon property after ruling that Defendants, after deducting the HVAC portion of Whipple's

claim, were entitled to a money judgment of \$527.00, however, upon factoring in Whipple's successful defense of Defendant's Counterclaim, Whipple had a net advantage of \$24,473.00.

STANDARD OF REVIEW: "The Standard of Review on appeal of the reasonableness of a trial court's award of attorney fees is patent error or clear abuse of discretion." Faust v. Kai Technologies, Inc., 15 P.3d 1266 (Utah 2000)¹

CITATION TO RECORD WHERE ISSUE PRESERVED: Defendants' Memorandum of Points and Authority in Support of Defendants' Request for Attorney Fees filed November 2, 1999, Record 1975; Notice of Appeal filed November 17, 2000, Record 2050.

APPLICABLE STATUTES AND RULE

Utah Code Annotated §38-1-18:

§38-1-18. Attorney's Fees. Except as provided in §38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action. *Amended by Laws 1961, c. 76; Laws 1995, c. 172, § 4, eff. May 1, 1995.*

STATEMENT OF THE CASE

¹ Defendant incorrectly characterizes the issue as being the trial court having incorrectly interpreted Utah Code Annotated §38-1-18 by denying to award Defendants their attorney fees, rather the issue concerns the reasonableness of the fees awarded or in this case not awarded. There is nothing in the record suggesting the trial court ruled that fees are not recoverable as claimed by Defendants therefore the standard of review is "abuse of discretion" not "review for correctness without deference to the lower court's conclusions."

A. NATURE OF THE CASE: This appeal is from the final judgment (on remand from the Utah Court of Appeals) of the Third District Court, Summit County, which, after calculating Defendants' offset for the HVAC system towards Whipple's damage award of \$20,273.00, denied Whipple's claim for relief of foreclosure of its \$30,647.20 mechanic's lien,² entered a judgment *against* Whipple in the amount of \$527.00, however, because Defendants' monetary recovery was negligible and they lost their Counterclaim, the trial court considered the outcome "a draw" and declined to award Defendants their attorney fees.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT
BELOW:

Following an appeal (first appeal) by the Defendants (homeowner and general contractor), the Utah Court of Appeals entered an order remanding the matter to the trial court for disposition consistent with its opinion. A.K. & R. Whipple Plumbing & Heating v. Aspen Construction, 977 P.2d 518, 527 (Utah App. 1999). After remand, the trial court held a telephone conference with the attorneys and set deadlines to submit memoranda as to the remaining issues identified by the Utah Court of Appeals for resolution by the Trial Court. The trial court held a hearing on November 10, 1999, at which time the trial court heard arguments and took evidence (by way of affidavit) as to the reasonable attorney's fees incurred by the parties. On January 20, 2000, the trial

² See Addendum "1"- Whipple's Notice of Claim of Lien filed September 14, 1993.

court entered its Memorandum Decision as to the remaining issues - Record 2022. The trial court, after calculating the offset for the HVAC system towards Whipple's recovery entered a money judgment in favor of the homeowner and Aspen and *against* Whipple in the amount of \$527.00. The trial court declined to award either party their reasonable attorney fees based upon an analysis which, while resulting in a monetary award to Defendants of \$527.00, actually calculated a net advantage to Whipple in the amount of \$24,473.00. Based thereon, the Court was of the opinion that the outcome was essentially "a draw" and concluded neither party should be awarded its fees.

Sometime in September, 2000, Whipple's attorney submitted Amended Findings of Fact and Conclusions of Law and an Amended Order of Foreclosure as directed by the trial court in the Memorandum Decision. The trial court signed the amended pleadings which were filed with the clerk of the court on October 18, 2000. On November 17, 2000, the Defendants filed a Notice of Appeal in relationship to the trial court's failure to award the Defendants their reasonable attorney fees incurred in successfully defending against the lien foreclosure proceeding in this action.

C. STATEMENT OF FACTS: For purposes of this appeal Whipple respectfully submits the following as being relevant for this appeal³:

1. On March 18, 1999, the Utah Court of Appeals entered an order remanding

³ A detailed summary of the underlying facts in this case are set forth fully in A.K. & R. Whipple Plumbing & Heating v. Aspen Const., 977 P.2d 518 (Utah App. 1999), a copy of which is included as Appendix "5." Addendum "5" to Defendants' Brief of Appellant.

this matter to the trial court for disposition of the matter consistent with its opinion stating:

¶ 31 The Utah mechanics' lien statute provides "in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action." Utah Code Ann. §38-1-18 (1997). In this case, although the trial court initially granted Aspen's motion to dismiss the HVAC portion of Whipple's mechanics' lien claim because of improper licensure, it went on to award Whipple the value of the work performed on Aspen's property. Based in part on this finding, the trial court concluded that Whipple was the prevailing party and entitled to an award of attorney fees. However, this conclusion may be erroneous in light of our determination that §58-55-604 precludes Whipple from recovering for its HVAC work. Based upon our review of the record, it appears the HVAC claim was the single most important issue in this case and Aspen, having fully prevailed on the HVAC claim in this appeal, may now be entitled to prevailing party status under §38-1-18. If on remand the trial court determines Aspen is the prevailing party under §38-1-18, then Aspen must be given the opportunity to present evidence regarding attorney fees incurred in pursuing its claim. ***We therefore remand this issue to the trial court for a redetermination of the attorney fees award consistent with this opinion and the entry of findings necessary to support the revised award.*** [Emphasis supplied by the Appellant.] (p. 525) *A. K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, cert. denied, 994 P.2d 1271 (Utah 1999).

Shortly after the remand, the trial court held a telephone conference with the attorneys and set deadlines to submit memoranda as to the remaining issues identified by the Court

of Appeals for resolution by the trial court. (Telephone Conference with Judge Noel held September 13, 1999.)

2. On November 2, 1999, the Defendants submitted their Memorandum of Law and Affidavit of Attorney's Fees which detailed the dates the work was performed, the hourly rate, the time spent, and described in detail the nature of the services performed. Additionally, the Defendants' attorney allocated the fees between: (1) the successful claims for which there may have been entitlement to fees; (2) the unsuccessful claims for which there would have been a claim for fees had the claims been successful; and (3) the claims for which there would be no entitlement to attorney's fees. (Defendants' Attorney's Affidavit - Record 1975).

3. The trial court held a hearing on November 10, 1999, in Salt Lake City. The court heard arguments and took evidence from the Defendants' attorney (by way of affidavit) as to the reasonable attorney's fees incurred by the Defendants. Whipple's attorney argued at the hearing that he could not allocate the fees, but after the hearing submitted his affidavit supporting his claim for attorney's fees. (Record 2062, Transcript of Hearing, Salt Lake City, Utah, November 10, 1999; Letter and Affidavit of Plaintiff's Attorney filed November 12, 1999-two days following the hearing; see also Defendants' Objection to the late submission filed November 17, 1999.)

4. On January 20, 2000, the trial court entered its memorandum decision as to the remaining issues. The trial court denied Whipple's claim for relief of foreclosure of

the \$30,647.20 mechanics' lien and entered a judgment *against* Whipple in the amount of \$527.00. (Record 2022) The initial appeal and subsequent remand involved three (3) separate lien foreclosure matters which were consolidated for trial.⁴ The trial court held for Whipple on the other two (2) lien foreclosure matters, determined the lien amounts (\$631.00 and \$1,666.00 respectively), found Whipple to be the "successful party" with respect to those liens, determined reasonable attorney fees related to those lien foreclosure matters (except as to attorney fees on appeal), and entered orders foreclosing the other two parcels of property respectively. (Record 2022) (Those judgments of foreclosure have subsequently been paid and satisfied by Defendant Aspen Construction (except some nominal costs and additional interest).

5. After deducting the cost of the HVAC system from Whipple's recovery Defendants were entitled to a money judgment against Whipple for \$527.00. However, because Whipple successfully defended Defendants' Counterclaim for negligence and the fact Defendants' recovery was based solely on a legal issue, the Court considered the outcome as to the 77 Thaynes Canyon property claim as a draw and therefore declined to award either party their reasonable attorney fees.

6. In September, 2000, the Plaintiff submitted Amended Findings of Fact and Conclusions of Law and an Amended Order in accordance with the trial court's January

⁴ The three lien foreclosure actions which were consolidated for purposes of trial are referenced hereinafter for the convenience of the Court as: (1) the Dianne Quinn lien; (2) the Tom Guy Poolhouse lien; and (3) the Thaynes Canyon property lien.

20, 2000, Memorandum Decision. These were subsequently signed by the trial court and were later entered by the clerk on October 18, 2000. (Record 2029) On November 17, 2000, the Defendants filed a Notice of Appeal in relationship to the trial court's failure to award the Defendant their attorney fees incurred in successfully defending against the lien foreclosure proceeding. No cross appeal has been filed by the Plaintiff. (Record 2050).

SUMMARY OF ARGUMENT

Whipple initiated this lawsuit seeking recovery for a significant amount of work which he had performed on the three properties which are the subject of this consolidated action. Whipple was forced to go to trial on all three properties and was required to put on a significant amount of evidence as to all three properties even though it was evident during the course of the trial that there was no legitimate defense to Whipple's claims relating to the Thomas Guy Poolhouse Property and the Diane Quinn Property.

At the conclusion of the trial Whipple had won on the merits on all of its significant claims and the offsets afforded the Defendants were primarily the result of no written agreements relating to the work in question and unfinished work attributable to Whipple being discharged from the job by Aspen. The \$7,000.00 award for damages related to the HVAC system was extremely excessive and unsupported by any evidence supporting what the cost of repair would be for the deficiencies identified in the trial court's Minute Entry and should have been challenged by Whipple nevertheless,

Whipple accepted the result.

The coup de gras for Whipple was the evisceration of its claims by deletion of the HVAC system changing the net money recovery on the 77 Thaynes Canyon property from an \$8,646.00 recovery in favor of Whipple to a \$527.00 recovery in favor of the Defendants due to, as the trial court stated, based on a “legal issue.” Keep in mind the trial court rejected Defendant’s claims that the system was flawed and would need to be removed at a cost of \$25,000.00. The Court found the system to be sound except for some minor deficiencies, many of which could be corrected with “fine tuning of the system.” (See Addendum “3” to Defendants’ Brief for Appellants)

Upon consideration of the foregoing coupled with the recognition that after deducting the value of Whipple’s successful defense of Defendants’ Counterclaim from Defendants’ net money recovery, it is clear that Whipple is still the “successful party.”

The trial court’s analysis of the facts as identified in the record and summarized in it’s Memorandum Decision carefully analyzes all of the facts of the case and reconciles the factors to be considered in an award of attorney fees. Consequently, the trial court’s decision related to it’s attorney fee award is reasonable and does not warrant reversal.

ARGUMENT

POINT I

DEFENDANTS HAVE FAILED TO MARSHAL EVIDENCE ESTABLISHING AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT

Clearly Utah Code Annotated §38-1-18 provides for the award of reasonable attorney fees to a successful party in an action to enforce a lien under this chapter, however, considering Defendants have failed to marshal any evidence demonstrating that the trial court has ruled that attorney fees are not recoverable in this action then Defendants' appeal must be denied or this Court must find that Defendants' brief demonstrates the trial court's refusal to award attorney fees to either party was patent error or an abuse of discretion. In Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998), our Supreme Court held:

“The standard of review on appeal of a trial court's award of attorney fees is ‘patent error or clear abuse of discretion.’”

Nothing in Defendants' brief suggests the trial court's ruling constituted patent error or an abuse of discretion nevertheless in anticipation that this Court determines Defendants have marshaled sufficient evidence permitting the review of the trial court's decision in the context of an abuse of discretion, standard of review, Whipple will respond accordingly.

In simple terms it is Defendants' claim that because it received a net recovery of \$527.00 related to the 77 Thaynes Canyon property it is the successful party to this lawsuit and thus entitled to its attorney fees in the amount of \$30,902.89 and the trial court's failure to award Defendants their fees is in contravention of this Court's directive as contained in its opinion rendered in A.K. & R. Whipple Plumbing and Heating v.

Aspen Construction, 977 P.2d 518 (Utah 1999). Defendants' argument is flawed in two respects, first, the trial court has broad discretion in determining what constitutes reasonable attorney fees and so long as the trial court's analysis comports with the criteria set down for the award of such fees the trial court's award should not be disturbed and second, under a complete analysis of the outcome of this action Whipple is the successful party.

POINT II

WHIPPLE IS THE SUCCESSFUL PARTY

As noted in the previous briefs filed by both parties, this was a trial that took place over a five (5) day period. At the conclusion of the trial, the trial court entered its judgment which was appealed and after remand the trial court made the necessary adjustments as ordered by this Court in its opinion rendered in A.K. & R. Whipple, 977 P.2d 518 (Utah 1999). The trial court's modified order is set forth in Addendum 4 to Defendants' Brief of Appellants at Page 4.

As noted, the trial court's breakdown omits any inclusion of the result of Whipple's successful defense of Defendants' Counterclaim of \$25,000.00 although in its discussion the trial court does refer to the disposition of this claim (see Page 5 of Addendum 4). The fallacy of Defendants' analysis is its failure to factor in and offset the value of this claim to all claims. Upon so doing, it is evident that the net advantage is Whipples and it is only after the inclusion of this amount that a true and accurate picture

of the outcome is obtained for the purposes of determining successful party status. The complete analysis of all claims is as follows:

1. Water and sewer laterals from curb to house		\$3,200.00
2. Plumbing (\$14,158.00 less \$2,000.00 for offsets)		\$12,158.00
3. Gas line		\$1,015.00
4. Backhoe		\$100.00
5. Water and sewer laterals from the street to the curb		\$7,000.00
6. HVAC \$12,265.00 contract price less \$3,092.00 to finish		<u>\$9,173.00</u>
TOTAL DUE WHIPPLE		\$32,646.00
AMOUNT PAID BY DEFENDANTS:	-	\$17,000.00
Offset for damages based on deficient work	-	\$7,000.00
TOTAL DUE WHIPPLE		\$8,646.00
Less contract price per Court of Appeals	-	\$9,173.00
TOTAL DUE DEFENDANTS		(\$527.00)
Whipple's successful defense of Defendants' Counterclaim in the amount of \$25,000.00		\$25,000.00
NET ADVANTAGE FOR WHIPPLE		\$24,473.00

As noted above when factoring in Whipple's successful defense of Defendants' Counterclaim Whipple is clearly the successful party even though the final judgment resulted in Defendant being awarded a nominal amount of money damages and Whipple

receiving no award of money damages. Such analysis is the appropriate way to ascertain successful party status. In Brown v. Richards, 840 P.2d 143 (Utah. App. 1992), this Court held as follows:

“...It is the determination of culpability, not the amount of damages, that determines who is the prevailing party.” See Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1038 (Utah 1981).

Accordingly, under a complete and accurate analysis of the outcome of all claims in this action Whipple prevails and is entitled to successful party status.

POINT III

ATTORNEY’S FEES MUST BE REASONABLE

Our Supreme Court held in Dixie State Bank v. Bracken, 764 P.2d 985, (Utah 1988), that the calculation of reasonable attorney fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion and while the Court acknowledged there was no set formula which controlled the determination of a reasonable fee, the Court did establish a framework of questions to be answered by the Court in assessing the reasonableness of an attorney fee award. The Court held as follows:

“While it is clear that trial court’s enjoy broad discretion in evaluating evidence to determine what constitutes a reasonable fee, there is little Utah law providing practical guidelines for this determination. (FN6) A brief discussion of earlier cases that have listed factors the trial court should consider in determining a reasonable fee is fundamental to our

analysis in the present case. In Wallace v. Build. Inc., 16 Utah.2d 401, 402 P.2d 699 (1965), this Court explained that what constitutes a reasonable fee is not necessarily controlled by any set formula. 16 Utah 2d at 405, 402 P.2d at 701. We stated: “What is reasonable depends upon a number of factors, the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge.”

In Trayner v. Cushing, 688 P.2d 856 (Utah 1984), this Court enlarged the list of potential factors by including “the relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved and the necessity of initiating a lawsuit to vindicate the rights under the contract.” *Id.* at 858 (citing Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982)).

Finally, in Cabrera v. Cottrell, 694 P.2d 622 (Utah 1983), which contains our most detailed analysis of attorney’s fees to date, the Court added:

the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

Id. at 625. The trial court may also take into account the provision in the Code of Professional Responsibility which specifies the elements that should be considered in *990 setting reasonable attorney’s fees. (FN7) *Id.* at 624.

[3] Although all of the above factors may be explicitly considered in determining a reasonable fee, as a practical matter the trial court should find answers to four questions:

1. What legal work was actually performed? (FN8)
2. How much of the work performed was reasonably necessary to adequately prosecute the matter? (FN9)
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services? (FN10)
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Upon review of the trial court's decision relative to the issue of attorney fees, it is clear that the Court considered all of the factors identified in Dixie. Set forth hereafter is a reconciliation of the trial court's analysis as contained in its Memorandum Decision (Addendum to Brief of Appellant) with the factors set forth in Dixie.

DIXIE CRITERIA

TRIAL COURT'S ANALYSIS

- | | |
|--|--|
| 1. What legal work was actually performed? (FN8) | Both parties submitted affidavits of attorney fees.

(Defendant's Attorney's Affidavit-Record 1975; Affidavit of Plaintiff's Attorney-Record 2062; and Plaintiff's Exhibit 4a) |
| 2. How much of the work performed was reasonably necessary to adequately prosecute the matter? (FN9) | The parties' affidavits broke down the work performed as to each claim in their respective affidavits. |
| 3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services? (FN10) | Both parties stipulated at trial to the necessity and reasonableness of each party's attorney fees affidavit. |

4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

The trial court considered the following factors as well:

- (a) Relationship of the fee to the amount recovered.
- (b) The novelty and difficulty of the issues and litigation.
- (c) The overall result achieved.
- (d) The amount involved in the case and the result obtained.

See Addendum 4 to Defendants' Brief.

Clearly the trial court's analysis more than addresses the factors set forth in Dixie and therefore demonstrates that the trial court's decision to not award either party its attorney fees was reasonable under the facts of this case and not patent error or a clear abuse of discretion.

CONCLUSION

The trial court never construed Utah Code Annotated §38-1-18 as denying the successful party to an action brought under this chapter the right to recover its attorney fees, only that based upon its analysis of the facts considered in the context of prevailing case law, neither Defendants or Whipple should be awarded its fees. Consequently, the standard of review of the trial court's decision is patent error or clear abuse of discretion and in light of Defendants' failure to marshal any evidence or even allege an abuse of discretion on the part of the trial court, their appeal must be denied. However, if this court determines that Defendants have marshaled adequate evidence for a review of the trial court's decision on the basis of an abuse of discretion standard, Whipple maintains

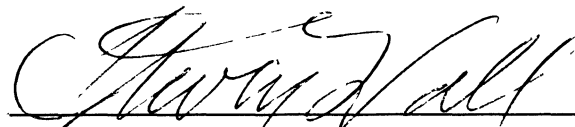
that the trial court's decision passes muster when analyzed in the context of the criteria established for determining the reasonableness of an attorney fee award as outlined in Dixie State Bank v. Bracken, 764 P.2d 985, (Utah 1988) and its progeny. Accordingly, Whipple contends that there is no basis to find an abuse of discretion on the part of the trial court in its decision not to award either party its attorney fees.

In addition to the foregoing Whipple has established that it was the successful party when factoring in its successful defense of Defendant's Counterclaim in the amount of \$25,000.00. Upon offsetting this amount against Defendant's net money award of \$527.00, Whipple has a net advantage in the amount of \$24,473.00. While Whipple received no monetary award for its success of this claim the value in relation to the total claims of both parties cannot be ignored or segregated out and must necessarily be considered and factored in when determining successful party status. As noted in the discussion supra it is the determination of culpability not the amount of money damages that determines the prevailing party therefore even under a net recovery analysis Whipple is the prevailing party.

The Court of Appeals should deny Defendants' appeal and remand this case back to the trial court with instructions to award Whipple its attorney fees related to its successful defense of the claims asserted by Defendants in the initial appeal related to the Thomas Guy Poolhouse property and the Diane Quinn property and to award Whipple its attorney fees related to this appeal.

DATED this 10th day of July, 2001.

Respectfully submitted,



STEVEN B. WALL

Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Appellee was ☒ mailed, postage prepaid, [] sent via facsimile transmission, [] hand-delivered on this 10th day of July, 2001, to the following:

Joseph M. Chambers
HARRIS, PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

